

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

9 RUBEN QUINTERO,	)	No. CV-F-04-5791 OWW
	)	(No. CR-F-02-5379 OWW)
)	
11 Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER'S
12 vs.	)	MOTION TO VACATE, SET ASIDE
	)	OR CORRECT SENTENCE PURSUANT
13 UNITED STATES OF AMERICA,	)	TO 28 U.S.C. § 2255 AND
	)	DIRECTING CLERK OF COURT TO
15 Respondent.	)	ENTER JUDGMENT FOR
	)	RESPONDENT
16 _____)	

On June 20, 2004, Petitioner Ruben Quintero timely filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner was charged by Superseding Indictment with use of a communication facility in connection with a drug offense in violation of 21 U.S.C. § 843(b). Petitioner pleaded guilty pursuant to a written Plea Agreement. The Plea Agreement specifically stated:

The defendant has read the charges against

1 him contained in the Indictment and the
2 Superseding Information in this case, and the
3 charges have been fully explained to him by
4 his attorney. Further, the defendant fully
understands the nature and elements of the
crimes with which he has been charged,
together with the possible defenses thereto,
and has discussed them with his attorney.

5 ...
6

7 **3. Agreements by the Defendant.**
8 ...

9 (g) Defendant, Ruben Quintero, hereby
acknowledges the benefits he has received
10 pursuant to the plea disposition set forth in
this memorandum and his guilt of the offenses
[sic] to which he is pleading guilty.
11 Defendant hereby waives all rights to contest
the means by which his plea of guilty will be
12 entered before the District Court. This
waiver includes, but is not limited to, any
13 claim, whether in District Court or in
appellate proceedings and on direct appeal or
14 subsequently, that the dictates of Federal
Rule of Criminal Procedure 11, or any
15 successor Rules, legislation or case
authority, were not followed in the entry of
16 defendant Quintero's guilty plea. The
defendant is also aware that Title 18, United
17 States Code, Section 3742 affords a defendant
the right to appeal the sentence imposed.
18 Acknowledging all this, the defendant
knowingly waives the right to appeal, on any
19 ground whatsoever, any sentence so long as
the initial term of imprisonment is four (4)
20 years or less. The defendant also waives his
right to challenge his conviction, sentence
or the manner in which his sentence was
21 determined in any collateral attack,
including but not limited to a motion brought
under Title 28, United States Code, Sections
22 2255 or 2241.
23

24 ...
25

26 **4. Joint Agreements By The Parties.**

(a) The defendant and the government agree

1 and stipulate that the amount of controlled
2 substances involved in the defendant's
3 offense is approximately 3024 grams of a
4 mixture or substance containing cocaine
base/crack. The mixture or substance
containing cocaine base/crack was 53% pure
resulting in 1602 grams of pure cocaine
base/crack.

5 . . .

6 **6. Factual Basis.**

7 The defendant will plead guilty because he is
8 in fact guilty of the crime set forth in the
9 Superseding Information. The defendant also
10 agrees that his guilty plea will be based
upon the following facts, although he
acknowledges that, as to other facts, the
parties may disagree:

11 Between approximately September 18,
12 2002 and September 30, 2002, in
13 Fresno County, State and Eastern
14 District of California, defendant
15 Ruben Quintero was a member of a
16 conspiracy to distribute, and
17 possess with intent to distribute,
18 cocaine base/crack. On or about
19 September 30, 2002, defendant Ruben
20 Quintero Roman [sic] engaged in
21 several telephone conversations
22 with his brother Manuel Quintero.
23 Those telephone conversations
24 concerned arrangements for Ruben
25 Quintero and Dalia Roman (Manuel
Quintero's girlfriend) to watch out
for law enforcement while Manuel
Quintero sold cocaine base/crack to
someone. On September 30, 2002,
Dalia Roman and Ruben Quintero
traveled to the apartment complex
at 3207 West Shields Avenue, Fresno
California in order to watch out
for law enforcement while Manuel
Quintero negotiated the sale of
cocaine base/crack. At all
relevant times, defendant Ruben
Quintero and his co-conspirators
knew that cocaine base/crack is a
controlled substance.

1 Petitioner was sentenced to 48 months incarceration and a 12
2 month term of supervised release. Petitioner did not file an
3 appeal.

4 Petitioner raises a number of grounds for relief:

5 I. Whether counsel was ineffective upon lack
6 of objection to the District Court Non-
Discretionary Nature of Imposition of
7 Supervise [sic] Release under Apprendi v. New
Jersey?;

8 II. Whether counsel was ineffective upon
9 allowing a plead guilty [sic] without
information of the 'voluntary; freely and
intelligent elements' where the absence of
assurances of the first 'core concerns of be
free of coercion and promises are lacking?;

10 III. Whether counsel was ineffective at
11 sentencing hearing upon lack arguments
12 regarding: (a) entrapment [sic] and
manipulation sentence, (b) his client
13 foreseeability of '2 kilos of cocaine', (c)
his client was less culpable and entitled to
14 four level downward departure upon minimal
role, (d) did no [sic] call for sentencing
hearing the codefendants' [sic] Manuel and
15 Dalia to support the minimal role and does
not contact nor call the movant families
(mother and sister) to entice the minimal
16 role under the facts of the case?;

17 IV. Whether miscarriage of justice is an
exception to the enforcement of waivers?;

18 V. Whether counsel was ineffective upon lack
of information to his client regarding the
19 'law' as applied to the facts of the present
case which did tainted [sic] the plead guilty
as unknowingly, involuntary [sic] and
unintelligently taken?;

20 VI. Whether counsel was ineffective upon
21 movant plead guilty was the product of (a)
coercion, (b) 'unlawfull out-of-court package
22 deal bargain based in [sic] his codefendant's
Manuel Quintero cooperation/agreement, (c)
23 out-of-court counsels and drug enforcement

1 agents 'secretive' package deal agreement?;

2 VII. Whether the District Court committed
3 plain error and abuse it [sic] judicial
4 function in accepting as factual basis of
guilty plea 'mere association and
communication with the perpetrator of the
criminal activity?;

5 VIII. Whether counsel failure to minimum
6 affording an Alford plea and/or calling for
7 pretrial hearing before the recommendation of
guilty plea was entered?

8 In support of his motion, Petitioner submits the following
9 declaration:

10 2. - I was never aware of any conversations
regarding drug deals from Manuel Quintero and
an [sic] confidential informant. I was never
present when both discussed a three kilogram
cocaine purchase and I was not in any
countersurveillance, since I was not present
at such meetings.

14 3. - During the arrest day on September 20,
2002, I was asked from Dalia's my sister in
law to pursue a ride to the Manuel apartment.
I was visiting my mom like every-day after
work. When I arrived to the apartment with
Dalia's, Manuel came to the car and
instructed me to leave the area and I did so,
I was think that because Manuel was to his
apartment some trouble was present between
him and Dalia in their relationship.

19 4. - I plead guilty to the offense based on
my lawyer recommendation that because I had
answered a phone call in the arrest day I was
guilty of conspiracy, I had no prior
conversations nor had understand the law nor
the facts of the case, counsel at no moment
had explained me anything regarding the case.
It was my understanding from the beginning
that I would be release based in agreement
between the counsels and the government for
Manuel cooperation, later counsel informing
that only boot camp would be permitted due to
no enoughly Manuel cooperation and when
sentence was schedule counsel had informed

1 that I would be sentence to camp or probatory
2 and after sentence had said that I was
3 allowed to have one year reduction mandatory.

4 5. - During all times, trial counsel had
5 informed that the case was enterily depending
6 of what Manuel was to do to handle his own
7 case, because Manuel guilty was also me
8 guilt. Nobody informed me that I would not
9 be culpable for association or family
10 relationship alone.

11 6. - Counsel treathening and coerce me to
12 plead guilty because according to counsel the
13 government was so powerfull that no way to
14 win the case was possible. I had no prior
15 convictions nor association with anything
16 regarding dope-deal, the attorney had
17 informed that the government was discussing
18 with him that I was involved on dope-deal in
19 the past years, I had very clear informed to
20 the counsel that it was untrue and that at no
21 moment I was involved in anything regarding
22 dope.

23 Based upon the foregoing motion of & 2255, I
24 believe that there is presented an
25 ineffective assistance counsel, had I
26 knowingly that the law was regarding the
27 present case I would with fiar and just
28 reason asserted my trial right at any cost.
29 [SIC]

30 Petitioner also submits a declaration by Manuel Quintero:

31 2. This declaration/affidavit is made to
32 support a Motion under & 2255 of Ruben
33 Quintero who also was charged with possession
34 and intent to distribute cocaine base/crack
35 and conspiracy to distribute cocaine
36 base/crack, in violation of 21 U.S.C. & 841,
37 I learned through my personal participation
38 in the outcome of the case that Ruben's was
39 later charged with superseding information
40 under communication to permit the narcotic
41 transaction under 21 U.S.C. & 843(b) and by
42 consultation with my trial attorney.

43 3. I had no negotiated the transaction
44 described from Agent's Campbel affidavit on
45 or About August 25, 1999 wherein appear I had

1 sold to detective Epifanio Cardenas one ounce
2 of cocaine while him was working in an
3 undercover capacity. Such affirmation was a
4 perjuris and had only looking the objective
5 of 'bolstering' the case to allowed the
6 communication with the confidential informant
7 Michael's. I had know the confidential
8 informant as Michael or simply Mike, but at
9 no moment with or without Michael had I sold
10 any cocaine to any undercover agent's as
11 appear in the D.E.A. Special agent affidavit.
12 I had not knowledge of such factor, nor had
13 my lawyer discussed with mine in fully the
14 truth of such transaction, would I be allowed
15 a face to face discussion with the named
16 Epifanio Cardenas him would no point such
17 factor as different to perjury and if allowed
18 or believed from the prosecution it would be
against the laws of the nature to think I had
been do so. I personally when had been sold
any dope had a personal knowledge of any
customer.

4. I had discussed on September 19, 2002
with Michael (C.I.) the selling of three
powder kilograms of cocaine. Before this
meeting years before when I had selling any
dope to Mike, it was powder and Mike in my
presence had been cooking into crack you own
dope based in the factor that I was never
interested in selling or be involved in the
crack cocaine transactions/business. I had
personal knowledge that Mike had always
transformed any powder cocaine into crack in
order to selling to Mike distributors.

5. After I came to prison, I learned that
Mike had been arrested for crack cocaine
transactions and today I understand that it
was the main factor which let him intent
involvement with mine in the
crack/enterprises. I had not knowledge nor
was discovered from my lawyer's that Mike was
incorporating with law enforcement agencies
in order to hope a favorable treatment with
regard to his own drug trafficking offense.

6. I am responsible for what happen on
September 30, 2002, when I was arrested and
charged in the offense I did made an
agreement which is fair called out-of-court

1 agreement with my lawyer, my lawyer promised
2 me that if I plead guilty and cooperated with
3 the government my brother and codefendant's
4 Manuel would be release of the offense, I had
5 explained to both my lawyer and the
6 government agents that my brother had nothing
7 to do with the transaction or offense and
8 that my brother had no the minimum knowledge
9 of what I was and had been done on the arrest
10 day.

11 7. When I plead guilty to the offense, my
12 lawyer told me, that pressure in my brother
13 was necessary in order to I obtain lenient
14 sentence and that if my cooperation was not
15 enough, my brother should be sentenced to
16 both camp or probation. There was an out of
17 court agreement between my lawyer, the
18 government and myself to plead guilty and
19 enticing my brother to do the same in
20 exchange of lenitent sentence based on my
21 cooperation and release or boot camp to my
22 probation or alternatively probation
23 sentence.

24 8. I had not called to Ruben, my intention
25 was always call to my law common wife's
1 Dalia, but she had asked Ruben to be brought
2 through a ride in the Ruben's car, since she
3 had no car available.

4 9. I had no knowledge that the law of the
5 United States doesn't permitted guilty for
6 association or guilty for familirelationship,
7 it was no explained to myself from trial
8 counsel.

9 10. Had Ruben asserted jury trial I was abel
10 to offer the same testimony included in the
11 present declaration, which is based in the
12 truth, I had no knowledge that the government
13 intention was to sentencing Ruben to
14 incarceration time, since both my lawyer and
15 the own government during metings had
16 enoughly explained that as product of my
17 cooperation Ruben and Dalia would be release
18 of the offense. I did offer my cooperation
19 and still am able to cooperate but also I
20 must states before this court that Ruben had
21 nothing to do with my offense and if I would
22 understand that my lawyer and government had
23
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26

1 misleading the factor tha Ruben would be
2 incarcerated, I would at no moment pressure
3 Ruben to plead guilty.

4 Petitioner also submits the declaration of his sister, Alma L.

5 Quintero:

6 Ruben had the habit of coming to my mother's
7 house in the afternoons after work. On the
8 day of his arrest, it was no different. He
9 came home to 2469 South Laureen. On the same
10 day, my sister in law, Dalia Roman was also
11 at my mother's housse. Since she had no car
12 to drive herself home, she asked my brother,
13 Ruben, to give her a ride to her apartment
14 located on Shields Avenue and Valentine
15 Avenue. Being Ruben's sister I know him well
16 and can attest on his behalf that he was not
17 involved in any type of illegal activity nor
18 is he a delinquent. We have a good
19 relationship and trust each other.

20 Therefore, if there were anything wrong then
21 he would have told me. During the trial and
22 court proceedings I was not call [sic] upon
23 to present my testimony nor was I given the
24 opportunity to speak with his counsel. I
25 firmly believe the justice system can give my
26 son [sic] Ruben Quintero equity, as he did
 not recive a fair trial.

Petitioner also submits the declaration of his mother, Maria
Quintero, which is in all respects identical to that of Alma
Quintero.

A. Effect of Waiver in Plea Agreement.

A defendant may waive the statutory right to bring a Section
2255 motion challenging the conviction or sentence. *United
States v. Pruitt*, 32 F.3d 431, 433 (9th Cir.1994); *United States
v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.1992), cert. denied, 508
U.S. 979 (1993). The Ninth Circuit ruled that "a plea agreement
that waives the right to file a federal habeas petition pursuant

1 to 28 U.S.C. § 2254 is unenforceable with respect to an IAC claim
2 that challenges the voluntariness of the waiver." *Washington v.*
3 *Lampert*, 422 F.3d 864, 871 (9th Cir.2005), cert. denied, 547 U.S.
4 1074 (2006). Petitioner makes no claim in his Section 2255
5 motion that he was denied the effective assistance of counsel or
6 that the waiver of his right to collaterally attack his
7 conviction and sentence was not knowing and voluntary because of
8 ineffective assistance of counsel. Consequently, Petitioner
9 cannot challenge his conviction or sentence pursuant to Section
10 2255.

11 B. Ineffective Assistance of Counsel.

12 The Court assumes, arguendo, that Petitioner's waiver does
13 not preclude his claims of ineffective assistance of counsel.

14 1. Governing Standards.

15 To establish an ineffective assistance of counsel claim,
16 Petitioner must show: (1) the representation was deficient,
17 falling "below an objective standard of reasonableness"; and (2)
18 the deficient performance prejudiced the defense. *Strickland v.*
19 *Washington*, 466 U.S. 668, 687 (1984). The Court need not
20 evaluate both prongs of the *Strickland* test if the petitioner
21 fails to establish one or the other. *Strickland*, *id.* at 697;
22 *Thomas v. Borg*, 159 F.3d 1147, 1152 (9th Cir.1998), cert. denied,
23 526 U.S. 1055 (1999).

24 Under the first prong, Petitioner must show that "counsel
25 made errors so serious that counsel was not functioning as the
26 'counsel' guaranteed the defendant by the Sixth Amendment."

1 Strickland, 466 U.S. at 687. "A convicted defendant making a
2 claim of ineffective assistance must identify the acts or
3 omissions of counsel that are alleged not to have been the result
4 of reasonable professional judgment." *Id.* at 690. "A fair
5 assessment of attorney performance requires that every effort be
6 made to eliminate the distorting effects of hindsight, to
7 reconstruct the circumstances of counsel's challenged conduct,
8 and to evaluate the conduct of counsel's performance at the
9 time." *Id.* at 689. The proper inquiry is whether, "in light of
10 all the circumstances, the identified acts or omissions were
11 outside the wide range of professionally competent assistance."

12 *Id.* The court must apply "a heavy measure of deference to
13 counsel's judgments," and "must indulge a strong presumption that
14 counsel's conduct [fell] within the wide range of reasonable
15 professional assistance." *Id.* at 690-691. "The relevant inquiry
16 under *Strickland* is not what defense counsel could have pursued,
17 but rather whether the choices made by defense counsel were
18 reasonable." *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th
19 Cir.1988). "The failure to raise a meritless legal argument does
20 not constitute ineffective assistance of counsel." *Shah v.*
21 *United States*, 878 F.2d 1156, 1162 (9th Cir.1989). A decision to
22 waive an issue where there is little or no likelihood of success
23 and concentrate on other issues is indicative of competence, not
24 ineffectiveness. See *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th
25 Cir.1989).

26 To meet the prejudice requirement, the petitioner must

1 demonstrate that errors "actually had an adverse effect on the
2 defense." *Strickland*, 466 U.S. at 693. "It is [also] not enough
3 for the defendant to show that the errors had some conceivable
4 effect on the outcome of the proceeding." *Id.* "Virtually every
5 act or omission of counsel would meet that test, and not every
6 error that conceivably could have influenced the outcome
7 undermines the reliability of the result of the proceeding." *Id.*
8 "The defendant must show that there is a reasonable probability
9 that, but for counsel's unprofessional errors, the result of the
10 proceeding would have been different. A reasonable probability
11 is a probability sufficient to undermine confidence in the
12 outcome. *Id.* at 694. Where a petitioner enters a guilty plea
13 upon the advice of counsel, the voluntariness of the plea depends
14 upon whether the petitioner received effective assistance of
15 counsel. In order to prevail on an ineffective assistance of
16 counsel claim, "the [petitioner] must show that there is a
17 reasonable probability that, but for counsel's errors, he would
18 not have pleaded guilty and would have insisted on going to
19 trial." *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985).

20 2. Failure of Counsel to Advise Petitioner of What the
21 "Element Voluntary" or the "Element Freely and Intelligently"
22 Meant Before Entry of Guilty Plea.

23 Petitioner claims that he was denied the effective
24 assistance of counsel because of counsel's failure to advise
25 Petitioner that his guilty plea must be voluntary, knowing and
26 intelligent. Petitioner asserts that he was "coerced and forced

1 from his counsel to enter the plead of guilty, nothing in the
2 agreement indicates the appellant's guilty or signature would not
3 be the result of 'force or coercion or assurance or promises.
4 [sic].'" Petitioner asserts that his "main motive to plea of
5 guilty was the product of his lawyer coercion and promises that
6 petitioner's would be sentenced to probation and faces not jail
7 incarceration."

8 Petitioner's claims are belied by the terms of the Plea
9 Agreement and the Rule 11 colloquy conducted during the change of
10 plea proceedings. The Plea Agreement specifically stated:

11 2. Nature, Elements and Possible Defenses.

12 The defendant has read the charges against
13 him contained in the Indictment and the
14 Superseding Information in this case, and the
15 charges have been fully explained to him by
16 his attorney. Further, the defendant fully
understands the nature and elements of the
crimes with which he has been charged,
together with the possible defenses thereto,
and has discussed them with his attorney.

17 ...

18 10. Entire Agreement.

19 The defendant and his attorney acknowledge
20 that no threats, promises or representations
21 have been made, nor agreement reached, other
than those set forth in this agreement and
the memorandum to induce defendant to plead
guilty.

22 During the Rule 11 colloquy, Petitioner stated under oath that he
23 had completed a high school education, that he had never been
24 treated for a mental illness or for addiction to narcotic drugs,
25 and that he had not consumed any medicine, drug or alcohol on the
26

1 day of sentencing. Petitioner stated under oath that he had read
2 the Plea Agreement, that he had discussed it with Mr. Harralson
3 and asked Mr. Harralson questions about the Plea Agreement before
4 signing it, and that he understood the Plea Agreement before
5 signing it. Petitioner stated under oath he had been able to
6 discuss the charge in the Superseding Information and how it
7 would be defended at trial with Mr. Harralson and that Petitioner
8 was completely satisfied with the legal advise, counsel and
9 representation Mr. Harralson had provided. During the change of
10 plea proceedings, the Court orally reviewed in open court every
11 provision of the Plea Agreement with Petitioner and asked
12 Petitioner if he agreed. In every instance, Petitioner stated
13 that he did. After reviewing with Petitioner every provision of
14 the Plea Agreement pertaining to agreements by Petitioner and
15 agreements by Respondent, the following occurred:

16 Q. I have gone through what I understand in
17 this writing to be the entire agreement as to
what you are supposed to give and get in
return. Do you have any different
understanding? Has anybody promised you
anything that I have not just gone over?

19 A. No.

20 Q. Has anybody threatened you or put
pressure on you to get you to change your
plea?

22 A. No.

23 The Court then reviewed with Petitioner the maximum punishment
24 for the crime, including that the maximum term of supervised
25 release was one year. Petitioner stated that he understood the
26

1 maximum sentence that could be imposed. The Court reviewed with
2 Petitioner the elements of the offense that must be proved before
3 Petitioner could be convicted. Petitioner stated that he
4 understood the elements. The Court then reviewed with Petitioner
5 the factual basis for the guilty plea set forth in the Plea
6 Agreement and asked Petitioner if those facts were true, to which
7 Petitioner responded "yes." After reviewing with Petitioner each
8 of the constitutional and statutory rights Petitioner was giving
9 up by not having a jury trial, asking Petitioner if he understood
10 each of those rights and was willing to give them up, to each of
11 which Petitioner responded affirmatively, the Court asked
12 Petitioner how he pleaded to the Superseding Information. After
13 Petitioner pleaded guilty, the Court found:

14 It is the finding of the Court in the case
15 United States versus Ruben Quintero that the
16 defendant is fully capable of entering an
17 informed plea. His plea of guilty is knowing
and voluntary. It is supported by
independent facts that establish each
essential element of the offense.

18 Petitioner's contention that defense counsel was ineffective
19 because he did not explain to Petitioner that his guilty plea
20 must be voluntary, knowing and intelligent before the Court would
21 accept it is irrelevant given the detailed and specific Rule 11
22 colloquy described above. The Court determined based on
23 Petitioner's responses under oath that Petitioner voluntarily,
24 knowingly and intelligently entered into the Plea Agreement.

25

26 Petitioner's motion on this ground is DENIED.

1 3. Ineffective Assistance of Counsel Regarding Law and
2 Facts of Case.

3 Petitioner contends that he was denied the effective
4 assistance of counsel because counsel failed to explain to
5 Petitioner prior to the entry of the guilty plea the following:

6 1). Petitioner was not informed at all of
7 the sentence entrapment;
8
9 2). Petitioner's was not informed at all
10 from his counsel of the sentencing
11 manipulation as trial defense;
12
13 3). Petitioner's was no informed that he
14 wasn't entitled to be found guilty based in
15 'family relationship as evidences substantive
of guilty';
16
17 4). Petitioner's was not informed that he
18 was not entitled to be found guilty whether
19 the government had used 'evidence of
20 association' as substantive of guilty. [SIC]

21 Petitioner's claims of ineffective assistance of counsel are
22 believed by the Rule 11 colloquy discussed above. Petitioner
23 admitted under oath that he had discussed the charge against him
24 and how it would be defended with defense counsel prior to
25 signing the Plea Agreement and that he understood the Plea
26 Agreement. Petitioner admitted under oath that he had read that
aspect of the Plea Agreement setting forth the elements that must
be proved by the United States beyond a reasonable doubt. During
the Rule 11 colloquy the Court read those elements to Petitioner
and Petitioner stated that he understood those elements,
including the element that Petitioner became a member of the
conspiracy knowing at least one of its purposes and intending to

1 help accomplish it. The sentence was based on a superseding
2 information under which Petitioner pleaded to a phone count
3 carrying a maximum sentence of 48 months.

4 Petitioner's contention that counsel was ineffective for
5 failing to advise Petitioner that "sentencing entrapment" or
6 "sentencing manipulation" are trial defenses is without merit.
7 "Sentencing entrapment or 'sentence factor manipulation' occurs
8 when 'a defendant, although predisposed to commit a minor or
9 lesser offense, is entrapped into committing a greater offense
10 subject to greater punishment.'" *United States v. Staufer*, 38
11 F.3d 1103, 1106 (9th Cir.1994). "'[S]entencing entrapment may be
12 legally relied upon to depart under the Sentencing Guidelines
13'" *Id.* at 1108. Consequently, counsel was not ineffective by
14 failing to advise Petitioner that sentencing entrapment is a
15 defense to the crime of conviction.¹

16 Petitioner contends that counsel was ineffective because he
17 failed to conduct pretrial investigation of the confidential
18 informant to discover his criminal history or to move for
19 severance of his trial from that of his co-defendants to avoid
20 any spill-over effect.

21 Petitioner's claim of ineffective assistance because of the
22 failure to move for severance fails on the prejudice prong. A
23 motion for severance is rarely granted in a conspiracy case

24
25 ¹Further, Petitioner makes no showing from which it may be
26 inferred that he would not have pleaded guilty and gone to trial
based on the alleged sentencing entrapment or that he was even
subjected to sentencing entrapment. The opposite is true.

1 because any possibility of prejudice resulting from the spill-
2 over effect of evidence is negated by the use of limiting
3 instructions.

4 Petitioner's claim of ineffective assistance because of
5 counsel's failure to seek discovery of the criminal history of
6 the confidential informant is without merit. Rule 16(a)(2),
7 Federal Rules of Criminal Procedure, states that, except as
8 provided in Rule 16(a)(1)

9 this rule does not authorize the discovery or
10 inspection of reports, memoranda, or other
11 internal government documents made by the
attorney for the government or any other
government agent investigating or prosecuting
the case. Nor does the rule authorize the
discovery or inspection of statements made by
government witnesses or prospective
government witnesses except as provided in 18
U.S.C. § 3500.
14

Section 3500(a) provides:

15 In any criminal prosecution brought by the
United States, no statement or report in the
possession of the United States which was
made by a Government witness (other than the
defendant) shall be the subject of subpoena,
discovery, or inspection until said witness
has testified on direct examination in the
trial of the case.
19

20 This court lacks the authority to order pretrial discovery of
Jencks Act material over the government's objection. *United*
22 States v. Mills, 641 F.2d 785,790 (9th Cir.), cert. denied, 454
23 U.S. 902 (1981). Furthermore, as held in *United States v. Jones*,
612 F.2d 453, 455 (9th Cir. 1979), cert. denied, 445 U.S. 966
25 (1980):

26 Brady does not overcome the strictures of the

1 Jencks Act. When the defense seeks evidence
2 which qualifies as both Jencks Act and Brady
material, the Jencks Act standards control.

3 Finally, the Supreme Court has held that "[t]here is no general
4 constitutional right to discovery in a criminal case, and Brady
5 did not create one" *Weatherford v. Bursey*, 429 U.S. 545,
6 559 (1977).

7 Petitioner claims ineffective assistance of counsel because
8 counsel informed Petitioner that "'because Manuel conspired with
9 the confidential informant' the agreement requisite to conspiracy
10 did exist." Petitioner asserts:

11 Counsel information that Manuel had conspired
12 with the informant was fatal to the plea of
guilty obtention [sic], Manuel as matter of
13 law wouldn't conspired with an [sic]
14 'government agent or informant.' Counsel at
no moment nor the court itself had informed
the movant's [sic] that the conspiracy had to
be proved between 'Manuel, Dalia and perhaps
15 the petitioner,' had the petitioner's know
[sic] that that [sic] the conspiracy would
not as a matter of law to be proved between
16 Manuel and the informant, with fair reason
this movant's would have asserted his trial
right and reject the government's and counsel
17 [sic] plead of guilty.
18

19 Petitioner's contention is belied by the factual basis for
20 Petitioner's guilty plea in the written Plea Agreement and in the
21 Rule 11 colloquy in which Petitioner admitted under oath to those
22 facts. The factual basis of Petitioner's guilty plea clearly
23 describes Petitioner's co-conspirators as Manuel Quintero and
24 Dalia Roman. Manuel Quintero, who pleaded guilty on the same day
25 as Petitioner, pleaded guilty to the following facts in his
26 written Plea Agreement and during his Rule 11 colloquy:

1 Between approximately September 18, 2002 and
2 September 30, 2002, in Fresno County, State
3 and Eastern District of California, defendant
4 Manuel Quintero was a member of a conspiracy
5 to distribute, cocaine base/crack. As part
6 of this conspiracy, on or about September 30,
7 2002, defendant Manuel Quintero approximately
8 three kilograms of cocaine base/crack which
9 he intended to sell to another person. On or
10 about September 30, 2002, defendant Manuel
11 Quintero engaged in several telephone
12 conversations with his girlfriend Dalia
13 Roman. Those telephone conversations
14 concerned arrangements for Dalia Roman and
15 Ruben Quintero (Manuel Quintero's brother) to
16 watch out for law enforcement while Manuel
17 Quintero sold cocaine base/crack to someone.
18 On September 30, 2002, Dalia Roman and Ruben
19 Quintero traveled to the apartment complex at
20 3207 West Shields Avenue, Fresno, California
21 in order to to [sic] watch out for law
22 enforcement while Manuel Quintero negotiated
23 the sale of cocaine base/crack. At all
24 relevant times, defendant Manuel Quintero and
25 his co-conspirators knew that cocaine
26 base/crack was a controlled substance.

14 Dalia Roman, who also pleaded guilty on the same day as her co-
15 defendants, pleaded guilty to the following facts in her written
16 Plea Agreement and during her Rule 11 colloquy:

17 Between approximately September 18, 2002 and
18 September 30, 2002, in Fresno County, State
19 and Eastern District of California, defendant
20 Dalia Roman was a member of a conspiracy to
21 distribute, and possess with intent to
22 distribute, cocaine base/crack. On or about
23 September 30, 2002, defendant Dalia Roman
24 engaged in several telephone conversations
25 with her boyfriend Manuel Quintero. Those
26 telephone conversations concerned
 arrangements for Dalia Roman and Ruben
 Quintero (Manuel Quintero's brother) to watch
 out for law enforcement while Manuel Quintero
 sold cocaine base/crack to someone. On
 September 30, 2002, Dalia Roman and Ruben
 Quintero traveled to the apartment complex at
 3207 West Shields Avenue, Fresno, California
 to to [sic] watch out for law enforcement

1 while Manuel Quintero negotiated the sale of
2 cocaine base/crack. At all relevant times,
3 defendant Dalia Roman and her co-conspirators
4 knew that cocaine base/crack was a controlled
5 substance.

6 These statements, all made under oath during the Rule 11
7 colloquies negate any claim of ineffective assistance of counsel
8 based on counsel's alleged statement to Petitioner that Manuel
9 Quintero had conspired with the confidential informant and that
10 counsel was ineffective in failing to investigate Petitioner's
11 involvement in the conspiracy.

12 Petitioner contends that counsel was ineffective by failing
13 to discover or contend that "Agent's Cambel [sic] created false
14 evidence that on or about August 25, 1999, Fresno Police
15 Detective Epifanio Cardenas working in an undercover capacity
16 purchased one ounce of cocaine from Manuel Quintero."

17 Petitioner's assertion is based on Manuel Quintero's
18 declaration filed in support of Petitioner's Section 2255 motion.
19 Even if Manual Quintero's averment is correct, evidence or lack
20 thereof of Manuel Quintero's past drug trafficking had no
21 relevance to Petitioner's guilt or innocence in the criminal
22 prosecution. Petitioner has not demonstrated prejudice as a
23 result of defense counsel's alleged failure to investigate Manuel
24 Quintero's claim.

25 Petitioner claims that counsel was ineffective because
26 "[c]ounsel informed his client that if guilty of conspiracy from
 trial jurors automatically also should be guilty of possession
 was crucial to the plea of guilty obtention [sic]."

1 Specifically, Petitioner claims that counsel did not advise him
2 of the law in *Pinkerton v. United States*, 328 U.S. 640 (1946).

3 In *Pinkerton*, the Supreme Court held that a party to an
4 unlawful conspiracy may be liable for the substantive offense
5 committed by a co-conspirator in furtherance of the conspiracy.
6 A defendant may be convicted under a *Pinkerton* theory for a
7 charged violation if the government proves: (1) the substantive
8 offense was committed in furtherance of the conspiracy; (2) the
9 offense fell within the scope of the conspiracy; or (3) the
10 offense could reasonably have been foreseen as a necessary of
11 natural consequence of the conspiracy. See *United States v.*
12 *Fonseca-Caro*, 114 F.3d 906, 908 (9th Cir.1997); *United States v.*
13 *Lopez*, 100 F.3d 98, 101 (9th Cir.1996).

14 Relying on *Pinkerton*, Petitioner asserts: "[C]ontrary [sic]
15 what counsel had explained and informed regarding the law under
16 *Pinkerton* to be deemed guilty of the substantive counts of
17 possession committed by Manuel, the jury had to be instructed
18 under *Pinkerton* and that proof of a conspiracy alone would not
19 sustain the possession charge."

20 Petitioner has not demonstrated ineffective assistance of
21 counsel based on this claim because he has not demonstrated
22 prejudice. Petitioner admitted the substantive offense to which
23 he pleaded guilty. Whether or not *Pinkerton* conspiracy
24 instructions would have been appropriate if Petitioner and his
25 co-defendants had gone to trial is speculative. There is no
26 present showing what evidence would have been presented at trial.

1 Moreover, a *Pinkerton* instruction is pro-prosecution as it
2 emphasizes the vicarious liability of conspiracy.

3 Petitioner contends that counsel was ineffective for
4 allegedly failing to inform Petitioner of the use of a
5 "deliberate ignorance" instruction. Petitioner asserts:

6 Counsel had been explained [sic] that because
7 the petitioner's may be had 'close the eyes'
8 when the offense was committed, it was
9 sufficient to sustain a conviction, but
10 counsel did not informed [sic] that regarding
11 such facts the movant's [sic] was still
12 entitled to deliberate ignorance instruction
13 because petitioner's [sic] denied actual
14 knowledge that the red cooler was improperly
15 containing dope, the movant's [sic] did not
16 know the essential facts that constituted
17 crime nor had the knew [sic] his conduct for
18 driving a car in order to get Dalia's
appearance to the scene of the crime was in
violation of the law, the case as presented
from the prosecution solely would present
evidence that the petitioner's [sic] 'perhaps
deliberately avoided knowledge' and perhaps
the petitioner's purposely contrived to avoid
learning the truth. The trial record would
support that petitioner's [sic] was aware of
a high probability that his understanding of
the crime was erroneous and consciously
avoided obtaining actual knowledge of his
actions.

19 Petitioner's claim of ineffective assistance of counsel is
20 without merit. "Deliberate ignorance" is not a defense to the
21 crime; rather, it is a theory of culpability presented by the
22 prosecution. See *United States v. Shannon*, 137 F.3d 1112, 1117-
23 1118 (9th Cir.), cert. denied, 524 U.S. 962 (1998), overruled on
24 other grounds, *United States v. Heredia*, 483 F.3d 913 (9th Cir.),
25 cert. denied, 128 S.Ct. 804 (2007):

26 Where the defendant's knowledge is at issue,

1 a 'deliberate ignorance' or 'Jewell'
2 instruction may be given where it is
3 warranted by the evidence presented at trial
4 ... If the parties present evidence of actual
5 knowledge as well as deliberate ignorance, a
6 Jewell instruction is appropriate ... Before
7 a defendant can be deemed to be deliberately
8 or willfully ignorant, facts must have put
9 her on notice of the probability of the
10 occurrence of criminal activity, that the
11 defendant failed to investigate, thus
12 deliberately choosing to not verify or
13 discover the criminal activity ... However, a
14 district court cannot give a Jewell
15 instruction when the evidence points only to
16 the defendant either having knowledge or not
17 having knowledge.

18 Petitioner contends counsel was ineffective because counsel
19 failed to advise Petitioner before pleading guilty "that he might
20 be sentenced without Guidelines consideration and because of the
21 movant's [sic] would have been sent to boot camp or obtain
22 probation for the offense due to the fact that maximum allowed
23 was four years." Petitioner asserts that "[a] competent lawyer
24 would have warned petitioner of the significant risk that the
25 guideline would have to the sentence, the advised of lawyer have
26 caused to reject the trial assertion, petitioner's [sic] was not
 sent to boot camp nor sentenced to probation due to his
 immigration status."

27 Petitioner's claim is belied by the terms of the written
28 Plea Agreement and the Rule 11 colloquy. Petitioner stated under
29 oath that he had read the Plea Agreement and discussed it with
30 counsel before signing it. The Plea Agreement specifically
31 details the process to be followed in determining Petitioner's
32 sentence and specifically states that the crime to which

1 Petitioner was pleading guilty provided a maximum of four years
2 imprisonment, which was the sentence eventually imposed. As
3 noted, the Court discussed each of these provisions in the Plea
4 Agreement with Petitioner during the Rule 11 colloquy and
5 Petitioner stated under oath that he understood them. Defense
6 counsel's inaccurate prediction of the type of sentence
7 eventually imposed is not ineffective assistance of counsel under
8 these circumstances. See *Doganiere v. United States*, 914 F.2d
9 165, 168 (9th Cir.1990), cert. denied, 499 U.S. 940 (1991);
10 *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir.1993), cert.
11 denied, 510 U.S. 1184 (1994). Petitioner was fully warned that
12 his sentence could be different from the sentence counsel
13 recommended and that the judge was not bound by the terms of the
14 Plea Agreement.

15 Petitioner claims counsel was ineffective because
16 "Petitioner's [sic] was misinformed from counsel regarding the
17 voir dire selection-random, had the movant's [sic] knew that the
18 government would not select jurors or be allowed to use
19 peremptory strikes to exclude (1) African-American or (2)
20 Hispanic-American from jurors selection based on race alone, the
21 movant's would have asserted his trial, [sic] at no moment the
22 movant had knowledge that him [sic] would be permitted to have in
23 the jury selection hispanic or african americans [sic] race."

24 Petitioner's claim is categorically without merit. The
25 written Plea Agreement specifically provided:

26 If the trial were a jury trial, the jury

would be composed of twelve lay persons selected at random. The defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges.

Petitioner stated under oath that he had read the Plea Agreement and discussed it with counsel before signing it and that he understood these rights and was willing to give them up during the Rule 11 colloquy. Petitioner's contention that he would have gone to trial if he had known that counsel could object to the prosecutor's use of peremptory challenges based on race under *Batson v. Kentucky*, 476 U.S. 79 (1986), is simply not credible, especially since a *Batson* issue is not based on any facts as jury selection was never conducted.

Petitioner claims counsel was ineffective because he failed to advise Petitioner that he could have subpoenaed Manuel Quintero and Dalia Roman as witnesses at trial. Petitioner presents no evidence that either Manuel Quintero or Dalia Roman told Petitioner at the time of his guilty plea that either would have testified on his behalf. Further, given their admissions under oath during their respective changes of plea, made the same day as Petitioner's change of plea, both would have been subject to impeachment if they testified contrary to their sworn representations to the Court and would face the possibility that their Plea Agreements would be vacated by the prosecution. Petitioner has not demonstrated prejudice under the *Strickland* standard.

1 Petitioner's motion on these grounds is DENIED.

2 4. Ineffective Assistance of Counsel at Sentencing.

3 a. Failure to Argue for Downward Departure Based
4 on Sentencing Entrapment.

5 Petitioner contends that he was denied the effective
6 assistance of counsel at sentencing because of his failure to
7 argue for a downward departure based on sentencing entrapment or
8 sentencing manipulation.

9 Petitioner makes no showing that he was subjected to
10 sentencing entrapment under the Ninth Circuit standards set forth
11 above. Consequently, counsel was not ineffective in failing to
12 argue for a downward departure based on sentencing entrapment.

13 Petitioner's motion on this ground is DENIED.

14 b. Forseeability of Amount of Cocaine.

15 Petitioner argues he was denied the effective assistance of
16 counsel at sentencing because of counsel's failure to argue that
17 Petitioner did not foresee the 2 kilograms of cocaine involved in
18 the crime.

19 Petitioner admitted in the written Plea Agreement and under
20 oath during the Rule 11 colloquy to the amount of cocaine
21 involved in the crime to which he pleaded guilty. Because of
22 Petitioner's admission, counsel could not argue at sentencing
23 that Petitioner did not "foresee" the amount of cocaine involved.
24 Further, because Petitioner was sentenced to well below the range
25 to which he was originally exposed, he has not demonstrated
26 prejudice within the meaning of *Strickland*.

1 Petitioner's motion on this ground is DENIED.

2 c. Failure to Call Co-Defendants and Petitioner's
3 Mother and Sister to Testify to Minimal Role.

4 Petitioner contends he was denied the effective assistance
5 of counsel because of counsel's failure at sentencing to call co-
6 defendants Manuel Quintero and Dalia Roman and Petitioner's
7 mother and sister to testify to Petitioner's minimal role in the
8 offense.

9 Petitioner has not demonstrated ineffective assistance of
10 counsel on this ground because Petitioner cannot demonstrate
11 prejudice. The PSR recommended a two-level reduction to
12 Petitioner's Base Offense Level for his minor role in the
13 offense, a reduction accepted by the Court when sentencing
14 Petitioner.

15 Petitioner's motion on this ground is DENIED.

16 d. Failure to Object to Term of Supervised
17 Release.

18 Petitioner contends that counsel was ineffective at
19 sentencing for failing to argue that the imposition of a term of
20 supervised release following Petitioner's release from
21 imprisonment violates *Apprendi v. New Jersey*, 530 U.S. 466
22 (2000).

23 Petitioner's claim is without merit. See *United States v.*
24 *Huerta-Pimental*, 445 F.3d 1220, 1222-122 (9th Cir.), cert.
25 denied, 549 U.S. 1014 (2006).

26 Petitioner's motion on this ground is DENIED.

1 5. Ineffective Assistance of Counsel in Advising

2 Petitioner to Plead Guilty.

3 Petitioner contends that counsel was ineffective in advising
4 Petitioner to plead guilty as a result of "(a) coercion, (b)
5 'unlawful out-of-court package deal based in [sic] his
6 codefendant's Manuel Quintero cooperation/agreement, (c) out-of-
7 court counsels and drug enforcement agents 'secretive' package
8 deal agreement."

9 Petitioner's claims of coercion to plead guilty and a
10 secretive package deal agreement are belied by the terms of the
11 written Plea Agreement and Petitioner's admissions under oath
12 during the Rule 11 colloquy. During the change of plea
13 proceedings, the Court reviewed every provision of the Plea
14 Agreement with Petitioner and asked Petitioner if he agreed. In
15 every instance, Petitioner stated that he did. Petitioner was
16 advised in the Plea Agreement and the Rule 11 colloquy that his
17 sentence would be determined by the Court upon recommendation of
18 the Probation Office, that the Court was not a party to the Plea
19 Agreement, and that, if the sentence pronounced was different
20 from what Petitioner expected, Petitioner would not be allowed to
21 withdraw his guilty plea. Petitioner stated under oath that he
22 understood and agreed. After reviewing with Petitioner every
23 provision of the Plea Agreement pertaining to agreements by
24 Petitioner and agreements by Respondent, the following occurred:

25 Q. I have gone through what I understand in
26 this writing to be the entire agreement as to
what you are supposed to give and get in

1 return. Do you have any different
2 understanding? Has anybody promised you
3 anything that I have not just gone over?

4 A. No.

5 Q. Has anybody threatened you or put
6 pressure on you to get you to change your
7 plea?

8 A. No.

9 Petitioner's motion on this ground is DENIED.

10 6. Failure to Afford an Alford Plea or To Call for
11 Pretrial Hearing Before Entry of Guilty Plea.

12 Petitioner contends counsel was ineffective "to minimum
13 afford a Alford Plea." Petitioner asserts that "Counsel would
14 have called both codefendants' for the proposition of an Alford
15 plea, based on his client innocence purposes."

16 In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme
17 Court held "an express admission of guilt ... is not a
18 constitutional requisite to the imposition of criminal penalty.
19 An individual accused of crime may voluntarily, knowingly, and
20 understandingly consent to the imposition of a prison sentence
21 even if he is unwilling or unable to admit his participation in
22 the acts constituting the crime." 400 U.S. at 37. The Supreme
23 Court noted:

24 Because of the importance of protecting the
25 innocent and of insuring that guilty pleas
26 are the product of free and intelligent
choice, various state and federal court
decisions properly caution that pleas coupled
with claims of innocence should not be
accepted unless there is a factual basis for
the plea ... and until the judge taking the
plea has inquired into and sought to resolve

1 the conflict between the waiver of trial and
2 the claim of innocence ... In the federal
3 courts, Fed. Rule Crim. Proc. 11 expressly
4 provides that a court 'shall not enter a
 judgment upon a plea of guilty unless it is
 satisfied that there is a factual basis for
 the plea.

5 *Id.* at 38 n.10.

6 Petitioner has not demonstrated prejudice as required by
7 *Strickland* because he makes no showing that an *Alford* plea would
8 have been acceptable to the United States and to the Court. See
9 *Clark v. Lewis*, 1 F.3d 814, 823 (9th Cir.1993). The written Plea
10 Agreement and the Rule 11 colloquy do not indicate in any way
11 that Petitioner was pleading guilty even though he was
12 maintaining his innocence of the crime to which he pleaded
13 guilty. There was a factual basis for Petitioner's guilty plea.

14 Petitioner's motion on this ground is DENIED.

15 7. Failure to Dispute Terry Investigative Stop.

16 Petitioner contends counsel was ineffective by failing to
17 move to suppress the results of a *Terry* stop.

18 Petitioner's claim is without merit. First, there was no
19 *Terry* stop. The Fourth Amendment prohibition of unreasonable
20 searches and seizures by the Government extends to brief
21 investigatory stops of persons or vehicles that fall short of
22 traditional arrest. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). The
23 PSR states that Petitioner was arrested driving away from the
24 scene of the drug transaction after he was seen by the
25 confidential informant delivering the cocaine to Manuel
26 Quintero's apartment. There is no question that the arresting

1 officers had probable cause to arrest Petitioner based on this
2 information.

3 Petitioner's motion on this ground is DENIED.

4 8. Entrapment by Estoppel.

5 Petitioner contends that counsel was ineffective "in
6 contending not with this affirmative defense of entrapment by
7 estoppel for trial purposes or by guilty plea intentions."

8 Petitioner asserts:

9 At the time of the guilty plea there was an
10 agreement between codefendant's [sic] Manuel
11 Quintero and the respondent for cooperation,
12 if Manuel Quintero was an [sic] 'government
cooperating witness' at the time of the plea-
guilty, Manuel Quintero would have not
recommended the guilty plea entering to the
petitioner's as part of his own affairs.

13 Petitioner's contention is without merit. Entrapment by
14 estoppel has no application or relevance to Petitioner's guilty
15 plea. "The entrapment by estoppel defense applies when an
16 authorized government official tells the defendant that certain
17 conduct is legal and the defendant believes the official ...
18 '[T]he defendant must show [1] that he relied on the false
19 information and [2] that his reliance was reasonable.' ... A
20 defendant's reliance is reasonable if ''a person sincerely
21 desirous of obeying the law would have accepted the information
22 as true, and would not have been put on notice to make further
23 inquiries.'''' *United States v. Brebner*, 951 F.2d 1017, 1024 (9th
24 Cir.1991).

25 Petitioner's motion on this ground is DENIED.
26

1 **CONCLUSION**

2 **For the reasons stated:**

3 1. Petitioner Ruben Quintero's motion to vacate, set aside
4 or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;
5
6 2. The Clerk of the Court is directed to ENTER JUDGMENT FOR
RESPONDENT.

7 IT IS SO ORDERED.

8 Dated: December 22, 2008

9 /s/ Oliver W. Wanger
10 UNITED STATES DISTRICT JUDGE

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